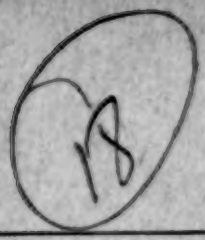

Supreme Court, U.S.
FILED
OCT 19 1998
OFFICE OF THE CLERK

No. 97-1709

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KUMHO TIRE COMPANY, LTD., *et al.*,
Petitioners,

v.

Patrick CARMICHAEL, *et al.*,
Respondents.

On Writ Of Certiorari to the United States Court Of Appeals for the Eleventh Circuit

BRIEF *AMICI CURIAE* OF NEIL VIDMAR, RICHARD O. LEMPERT, SHARI SEIDMAN DIAMOND, VALERIE P. HANS, STEPHAN LANDSMAN, ROBERT MacCOUN, JOSEPH SANDERS, HARMON M. HOSCH, SAUL KASSIN, MARC GALANTER, THEODORE EISENBERG, STEPHEN DANIELS, EDITH GREENE, JOANNE MARTIN, STEVEN PENROD, JAMES RICHARDSON, LARRY HEUER AND IRWIN HOROWITZ IN SUPPORT OF RESPONDENTS

Ronald Simon, Esq.*
1814 N Street, N.W.
Washington, DC 20036
202/466-4736
Attorney for Amici Curiae
* *Counsel of Record*

(Additional Attorneys Listed on Inside Cover)

October 19, 1998

BEST AVAILABLE COPY

HOPP

Ralph I. Knowles
1355 Peachtree Street, Suite 1600
Atlanta GA 30309
(404) 881-8900

Turner W. Branch
2025 Rio Grande Boulevard, NW
Albuquerque, NM 87104
(505) 243-3500

Ronald Motley
2202 Jackson Street
Barnwell, SC 29812
(803) 259-3525

Jack Baldwin
400 West Houston Street
Marshall, TX 75671
(903) 935-4131

Mark P. Robinson, Jr.
620 Newport Center, Drive, 7th Floor
Newport Beach, CA 92660
(949) 720-1288

Ronald D. Krist
17555 El Camino Real
Houston, TX 77058
(281) 283-8500

Robert Habush
777 East Wisconsin, Avenue, Suite 2300
Milwaukee, WI 53202-5381
(414) 271-0900

M. Clay Alspaugh
2323 2nd Avenue North
Birmingham, AL 35203
(205) 324-5635

Counsel

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Amici believe that this Court needs to consider four questions in order to properly decide the outcome of this case. These questions are

1. Do juries fail to critically evaluate expert testimony?

2. Are they overawed by such testimony?

3. Do they have a "natural tendency" to defer to the experts?

4. Do they have pro-plaintiff and anti-defendant biases?

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are university professors or hold positions in independent research institutions. Each has conducted empirical research on juries. The interest of these amici in this case is to provide the Court with an accurate picture of what a substantial body of research says about jury competence and behavior as it pertains to the evaluation of expert testimony. Short biographies of each *amicus* are provided in Appendix A.

Neil Vidmar, Ph.D., is Russell M. Robinson II Professor of Law and Professor of Psychology at Duke University. **Richard O. Lempert**, J.D./Ph.D., is Francis A. Allen Professor of Law and Professor of Sociology at the University of Michigan. **Shari S. Diamond**, Ph.D., J.D.. is a Senior Fellow at the American Bar Foundation and Professor of Psychology at the University of Illinois. **Valerie P. Hans**, Ph.D., is Professor of Sociology and Criminal Justice and Professor of Psychology at the University of Delaware. **Stephan Landsman**, J.D., is Robert A. Clifford Professor of Tort Law and Social Policy at DePaul University College of Law. **Robert MacCoun**, Ph.D., is Professor of Public Policy and Affiliated Professor of Psychology, University of California at Berkeley. **Joseph Sanders**, J.D., Ph.D., is A.A. White Professor of Law at the University of Houston. **Harmon M. Hosch**, Ph.D., is Professor of Psychology at the University of Texas at El Paso. **Saul Kassin**, Ph.D., is Professor of Psychology, Williams College. **Marc Galanter**, J.D., is the John and Rylla Bosshard Professor of Law at the University of Wisconsin. **Theodore Eisenberg**, J.D., is the Henry Allen Mark Professor of Law, Cornell Law School. **Stephen Daniels** , Ph.D., is a Senior Fellow at the American Bar Foundation. **Edith Greene**, Ph.D., is Associate Professor of Psychology at the

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici, their members, and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, amici state that the parties have granted blanket consent to the filing of briefs by amici supporting either party. The letter granting this consent is being lodged separately with the court.

University of Colorado. **Joanne Martin**, J.D., M.B.A. , is a Senior Research Fellow, American Bar Foundation. **Steven Penrod**, J.D., Ph.D., is Professor of Psychology and Professor of Law at the University of Nebraska-Lincoln. **James Richardson**, J.D., Ph.D., is Professor of Sociology and Judicial Studies at the University of Nevada, Reno. **Larry Heuer**, Ph.D., is Associate Professor of Psychology at Barnard College, Columbia University. **Irwin Horowitz**, Ph.D. is Professor of Psychology at Oregon State University.

SUMMARY OF ARGUMENT

This brief addresses the issue of jury performance and jury responses to expert testimony. It reviews and summarizes a substantial body of research evidence about jury behavior that has been produced over the past quarter century. The great weight of that evidence challenges the view that jurors abdicate their responsibilities as fact finders when faced with expert evidence or that they are pro-plaintiff, anti-defendant, and anti-business.

The Petitioners and *amici* on behalf of petitioners make a number of overlapping, but empirically unsupported, assertions about jury behavior in response to expert testimony, namely that juries are frequently incapable of critically evaluating expert testimony, are easily confused, give inordinate weight to expert testimony, are awed by science, defer to the opinions of unreliable experts, and, implicitly, that in civil trials juries tilt in favor of plaintiffs and against corporations.

The body of empirical research findings conducted by independent researchers and published in leading social science journals, law reviews and books, taken as a whole, strongly contradicts the Petitioners' assertions. Surveys of both federal and state judges show that the overwhelming majority of judges believe that juries are competent and conscientious. Studies comparing judges' opinions of the evidence at trial show substantial agreement with the verdicts rendered by juries. Research comparing jury verdicts in cases in which expert evidence is a critical issue, moreover, shows positive correlations with independent criteria of

performance. Case studies have produced similar findings. Experimental studies show mixed results but primarily support the jury system. Findings lend no support to the charge that, in general, juries hold pro-plaintiff biases or anti-business sentiments. In fact, the data tend to indicate that jurors are often skeptical of plaintiff claims.

Nothing in this amicus brief should be construed as a challenge to *Daubert* or *Joiner*. Nor does it take issue with a broad interpretation of FRE 403 and 702. The brief, however, does sharply challenge the view expressed in the Petitioners' and *amici*' briefs that juries are composed of persons who suspend critical reasoning skills whenever experts testify in a trial.

ARGUMENT

I. THIS AMICUS BRIEF IS LIMITED TO A DESCRIPTION OF WHAT A SUBSTANTIAL BODY OF EMPIRICAL RESEARCH HAS FOUND REGARDING THE COMPETENCE AND DILIGENCE OF JURIES.

We enter this case to assist the Court with a candid presentation of what social science evidence tells us about how juries respond to expert evidence. We believe that intervention by social scientists is necessary because a number of statements in the briefs of Petitioners and Petitioners' *amici* present as facts images of the jury that do not comport with what social scientists have learned about the capacities of juries and about the strengths and weaknesses of jury performance.

This case poses the questions of whether an experience-based analysis of a tire's failure should be considered scientific evidence within the meaning of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[2] and whether *Daubert* criteria should apply to screen the evidence. We express no opinion on these questions. Our interest is that the Supreme Court's decision on these matters not be

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[2] 509 U.S. 579 (1993).

influenced by a misunderstanding about how juries are likely to react to such evidence.

II. EMPIRICAL RESEARCH CONFLICTS WITH PETITIONERS' CLAIMS MADE ABOUT JURY INCOMPETENCE AND IRRESPONSIBILITY.

Over the last quarter century a substantial body of empirical research bearing on juror and jury behavior and performance has been conducted by researchers associated with many university and research institutions around the United States.[3] Most of the research findings in these studies challenge the assertions in the Petitioners' brief and Petitioners' *amici* briefs that juries are easily confused by expert evidence, that they quickly defer to experts (suspending their critical judgment) and that they tilt in favor of plaintiffs when experts testify in products liability and other "complex" cases.

Petitioners' brief at 23-25 makes a number of assertions that juries become confused with respect to expert testimony and defer to experts rather than exercise their own critical judgment about the

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[3] STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995); NORMAN FINKEL, COMMONSENSE JUSTICE: JUROR'S NOTIONS OF THE LAW (1995); VALERIE HANS & NEIL VIDMAR, JUDGING THE JURY (1986); SAUL KASSIN & LAWRENCE WRIGHTSMAN, THE AMERICAN JURY ON TRIAL (1988); NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS AND OUTRAGEOUS DAMAGE AWARDS (1995); Joe Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727 (1991); Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181 (Robert Litan ed., 1993); Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decision Making by Civil Juries*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137 (Robert Litan ed.,1993); Brian Ostrom et al., *A Step Above Anecdote: A Profile of The Civil Jury in the 1990s*, 79 JUDICATURE 233 (1996); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. (forthcoming 1998).

testimony: e.g. "Jurors are incapable of 'critically evaluating the bases for an expert's testimony' and too often give unquestioning deference to expert opinion;'" " [i]t is common knowledge, moreover, that jurors 'perform much less well when they sit in judgment on technology;'" "jurors often 'abdicate their fact-finding obligation' and simply 'adopt' the expert's opinion;" "[s]tudies have confirmed that jurors routinely believe the testimony of expert witnesses" (citing a *National Law Journal* survey of jurors).

Except for the *National Law Journal*[4] survey, no empirical research is cited in the Petitioners' brief to back up these assertions. The fact that the *National Law Journal* survey reported that eighty-nine percent of jurors found experts credible and seventy-one percent said their testimony made a difference in their verdicts does not allow a conclusion that jurors are gullible. The finding suggests only that experts are often considered credible by jurors, and that expert testimony could be important evidence in the trial. It does not support a conclusion that jurors give undue weight to expert testimony. The survey asked only for general opinions about all expert testimony. No effort was made to assess the actual quality of the expert testimony or the weight it was given. If jurors had indicated that the testimony had not made a difference, it would be a serious ground for concern, since that was the purpose of the judge allowing the testimony in the first place. Furthermore, the data cannot be used to assert that the use of experts increases success in litigation, only that a proportion of jurors thought that expert testimony made a difference.

The brief of the Washington Legal Foundation and the Manufacturers Alliance also makes reference to the *National Law Journal* survey and cites some of the same sources as the Petitioners plus an experiment by Cooper et al. (discussed below) that does not

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[4] *Expert Witnesses Found Credible By Most Jurors*, NAT'L L.J., Feb. 22, 1993, at S-4.

allow the conclusion that those *amici* draw from it. The briefs of the other *amici* make similar unsupported claims about juries.

In short, the briefs of the Petitioners and the various *amici* make allegations unsupported by systematic empirical research. The briefs ignore the large body of empirical research on juries. The predominant conclusion of this research is that juries do their job competently and conscientiously and without a general bias against corporate defendants.

III. SURVEYS OF TRIAL JUDGES INDICATE VERY POSITIVE VIEWS OF JURY COMPETENCE AND DILIGENCE.

Surveys show that the vast majority of trial judges give high marks to jury performance. In 1987 the *National Law Journal* conducted a survey of 348 state and federal judges regarding their views of juries.[5] Among other questions, the judges were asked what percentage of the time they disagreed with jury verdicts in trials over which they had presided. The vast majority of judges expressed little disagreement with the verdicts.

Another survey of 800 state and 200 federal judges who spent at least half their time on civil cases was sponsored by the Aetna Life and Casualty Company and carried out by Louis Harris and Associates[6] in 1987. Overwhelming majorities (ninety-eight percent) of both federal and state judges indicated that they believed juries make a "serious effort to apply the law"; they did not believe that "the feelings of jurors about the parties often cause them to make inappropriate decisions." The judges were also asked the following question: "Would you like to see a limitation on the use of juries for . . . Complex Civil Cases Involving Highly Technical and Scientific Issues?" Majorities of judges said they would not like a

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[5] *The View from the Bench*, NAT'L L. J., Aug. 10, 1987, at S1.

[6] Louis Harris and Assocs., *Judges' Opinions on Procedural Issues*, 69 B.U. L. REV. 731 (1989).

limitation and majorities were opposed to restrictions on jury trials for "Complicated Business Cases."

Sentell[7] surveyed samples of state and federal judges in the state of Georgia. Eighty-seven percent of judges indicated that they agreed with the jury verdict in approximately four cases out of five. Moreover, even when the judges disagreed with the jury, only fourteen percent indicated that it was their belief that the jury was pro-plaintiff, and only six percent believed it was because the jury did not understand the case.

IV. TRIAL JUDGES' VIEWS OF THE CASE SHOW HIGH AGREEMENT WITH JURY VERDICTS.

Harry Kalven and Hans Zeisel's classic study, *The American Jury*,[8] asked trial judges to indicate what their own verdict would be if the case had been tried as a bench trial. Judges agreed with civil and criminal jury verdicts seventy-eight percent of the time. Additional analysis of the criminal cases revealed that judges were no more likely to disagree with juries in factually difficult cases than in factually easy ones. Kalven and Zeisel concluded that in instances where there was disagreement, it was seldom attributed to the difficulty of the evidence.

The American Jury Study is almost a half century old, but recent studies yield similar results. Heuer and Penrod[9] persuaded a sample of judges from thirty-three states to provide them with a detailed analysis of 160 trials, of which 67 were civil trials. The judges were asked to provide information about the complexity of

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[7] Perry Sentell, *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85 (1991); Perry Sentell, *The Georgia Jury and Negligence: The View from the (Federal) Bench*, 27 GA. L. REV. 59 (1992).

[8] HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY (1966).

[9] Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Effects*, 18 LAW & HUM. BEHAV. 29 (1994).

the evidence and other information, rate their satisfaction with the jury's verdict and indicate what their own verdict would have been. The rates of judge and jury agreement were similar to those found by Kalven and Zeisel. The study also found that disagreements between judge and jury were not related to how complex the judge perceived the evidence to be. Heuer and Penrod concluded that "our data do not support the proposition that judges and juries decide cases differently [or that trial] complexity affects the rationality of jury decision making. . . ."

A study of 153 civil cases in Arizona by Hans et al.[10] also obtained detailed evaluations of the jury verdicts from the trial judges. The judges reported that the juries understood the key issues in almost all trials, and they were generally satisfied with the jury's decisions. Judges' agreement with jury verdicts was unaffected by the complexity of the trial or the number of experts. A study conducted by the National Center for State Courts in California found that judicial estimates of the direction and strength of the evidence were generally consistent with the jury verdicts.[11]

The findings from these studies indicate that in the vast majority of cases, judges and juries are likely to agree on the verdict. When they do differ, disagreement appears attributable to something other than the complexity of the evidence. Overall, judges overwhelmingly view juries as competent and conscientious.

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[10] Valerie Hans et al., *Letting Jurors Talk: An Analysis of the Arizona Jury Reform Permitting Predeliberation Discussion by Civil Jurors*, 32 U. MICH. J.L. REFORM (forthcoming 1999).

[11] G. THOMAS MUNSTERMAN ET AL., A COMPARISON OF THE PERFORMANCE OF EIGHT- AND TWELVE-PERSON JURIES (1990).

V. STUDIES COMPARING OPINIONS OF EXPERTS WITH JURY VERDICTS IN COMPLEX CASES SHOW AGREEMENT WITH JURY VERDICTS.

Another way of assessing jury performance in cases with complex testimony is to compare jury verdicts with opinions of experts from the same field as the trial experts. A common claim is that jury trials are inappropriate for malpractice cases because the legal issue revolves around the standard of medical care and ordinarily results in a "battle of experts" testifying about esoteric medical issues.[12] As in the area of products liability, jury critics have asserted that because juries cannot understand the evidence and also have unwarranted sympathies for injured plaintiffs, juries decide cases differently than medical experts would decide them. Taragin et al.[13] tested this proposition by comparing jury verdicts in 988 malpractice cases with the privileged evaluations made by physicians for the doctors' medical insurer. The verdicts of the juries were generally consistent with the evaluations of negligence made by the insurer's medical experts. Moreover, there was no relationship between the seriousness of injury suffered by the plaintiff and a finding of liability, suggesting juries did not decide cases out of sympathy. The Taragin et al. findings are supported by separate studies conducted by Sloan et al.[14] and Farber and White.[15]

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[12] DANIELS & MARTIN, *supra*; VIDMAR, *supra*.

[13] Mark Taragin et al., *The Influence of Standard of Care & Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANN. INTERNAL MED. 780 (1992).

[14] FRANK SLOAN et al., SUING FOR MEDICAL MALPRACTICE (1993).

[15] Henry Farber & Michelle White, *A Comparison of Formal and Informal Dispute Resolution in Medical Malpractice*, 23 J. LEGAL STUD. 77 (1991).

Viscusi[16] studied product liability verdicts in a sample of closed claims provided by the Insurance Services Office, a trade industry organization. Viscusi found that plaintiffs won only thirty-seven percent of cases decided in a court verdict. His central conclusion about verdict outcome was as follows:

> Once a claim has reached the court, its outcome rests on the factors leading to the injury, the nature of the arguments presented, and the legal doctrine governing the suit. The size of the loss has no statistically significant impact on the prospects of a claim, for juries do not appear to be persuaded by large and catastrophic losses.

Daniels and Martin[17] found similar results in their research on product liability cases.

While verdict studies give no direct insights as to how or why juries actually decided cases, the studies of outcomes lend indirect evidence contradicting the view that juries are irresponsible in deciding liability.

VI. CASE STUDIES OF JURY COMPETENCE IN COMPLEX TRIALS ALSO LEND LITTLE SUPPORT TO THE CLAIM THAT JURIES UNCRITICALLY DEFER TO EXPERTS.

Case studies have also been undertaken of jury performance in response to expert evidence. Selvin and Picus[18] interviewed jurors who decided an asbestos exposure case. Interviews with the jurors

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[16] W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY (1991).

[17] DANIELS & MARTIN, *supra*, at 168.

[18] MOLLY SELVIN & LARRY PICUS, THE DEBATE OVER JURY PERFORMANCE: OBSERVATIONS FROM A RECENT ASBESTOS CASE (Rand Institute for Civil Justice 1987).

led Selvin and Picus to conclude that the jurors did not understand the testimony. Nevertheless, they further concluded that the jurors were "generally skeptical if not negatively disposed toward many of the medical experts who testified in this case." In commenting on the Selvin and Picus study, Sanders[19] observed that the source of the juror misunderstanding may have been traceable to a defense expert. Also commenting on the case, Cecil et al.[20] observed that the jury's "misconceptions appeared to result from the incomplete presentation of medical testimony...."

In 1989 an ABA Special Committee on Jury Comprehension reported a study of four complex cases.[21] Some of the jurors had difficulty with various parts of the evidence. However, the most able jurors tended to lead the discussion, helping the others to understand the evidence and legal rules. The report concluded that the jurors were not unduly influenced by the expert testimony. The jurors recognized the important points on which the experts were in disagreement and rejected experts who appeared to them to be "hired guns."

Lempert[22] examined thirteen complex cases. He concluded that in two of the cases the expert evidence was so difficult and esoteric that it is unlikely that either jurors or judges could understand it. In the remaining cases the verdict was rated as "defensible." Lempert concluded that when the jury appeared to have erred there was little evidence that this was due either to jury irrationality or predominantly to the complexity of the case, and he

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[19] Joseph Sanders, *The Jury Decision in a Complex Case:* Havner v. Merrell Dow Pharmaceuticals, 16 JUST. SYS. J. 45, 48 n.15 (1993).

[20] *See* Cecil et al., *supra*, at 755.

[21] Special Committee On Jury Comprehension, *Jury Comprehension in Complex Cases*, 1989 A.B.A. Sec. Lit. 29-31.

[22] Lempert, *supra*, at 183-228.

reported no instance where the jury seemed to unthinkingly adopt an expert's conclusion as its own.

Sanders[23] examined the "congregation" of Bendectin cases, and he looked more closely at *Havner v. Merrell Dow,*[24] one of the trials in which the jury sided with the plaintiff. He conducted extensive interviews with the jurors and concluded that the jury's assessment of the importance of the various types of evidence presented at trial did not correspond with the views of independent experts. Yet, he also concluded that at least part of the problem could be ascribed to the lawyers and the judicial instructions. In his words:

> Nothing in this article should cause one to infer any lack of effort or diligence on the part of the *Havner* jurors . . . . If it is true that they were not centered on the most probative evidence, it is also true that the jurors were pointed toward [misleading] studies by both the judicial instructions and the evidentiary rules concerning the admissibility of research articles [that were requested by, but denied to, the jury].

Ivkovich and Hans[25] conducted in-depth interviews with fifty-five jurors from seven cases involving expert testimony. The jurors indicated problems with testimony that was technically complex. However, Ivkovich and Hans concluded that:

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[23] Sanders, *supra*. JOSEPH SANDERS, BENDECTIN ON TRIAL: A STUDY OF MASS TORT LITIGATION (1998).

[24] *Havner v. Merrell Dow Pharmaceuticals, Inc.* (Texas Dist. Ct., 214th Jud. Dist., Oct. 10, 1991). The verdict is noted in 41(19) *Products Safety and Liability Reporter* 1134, October 11, 1991.

[25] Sanja Ivkovich & Valerie Hans, *Jurors and Experts*, 16 ADVOC. MAG. DEL. LAW 17 (1994).

> the claims that jurors either ignore or accept uncritically expert testimony seem farfetched. We observed a good deal of critical assessment of experts, their credentials, and their motives for testifying. Jurors do not appear to be as naive as some commentators have assumed about the financial and other motivations that may lead some experts to be "hired guns." Furthermore, when jurors are faced with the difficult task of evaluating evidence that is outside their common knowledge, they rely on sensible techniques: assessing the completeness and consistency of the testimony, and evaluating it against their knowledge of related factors. For especially complex topics, the jury relies on its members who possess greater familiarity with the subject matter of the expert testimony.

Vidmar's[26] research on medical malpractice litigation also involved interviews with jurors. The jurors were often highly skeptical of the experts and attempted to put difficult or confusing testimony into a broader context.

These studies are complemented by a telephone survey of 156 former civil jurors in Texas by Shuman et al.[27] Those researchers concluded that jurors used rational criteria to assess the believability of expert testimony, including the experts' credentials, familiarity with the facts of the case, quality of reasoning, and perceived impartiality. Overall, defense experts were viewed as more believable than plaintiff experts.

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[26] *See* VIDMAR, *supra*, at 127-160; Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L. J. 885 (1994).

[27] Daniel P. Shuman et al., *Assessing the Believability of Expert Witnesses: Science in the Jury Box*, 37 JURIMETRICS J. 23 (1996).

In short, the case studies do raise concerns that in some cases juries may have been confused by the evidence, but they also suggest that in some of them judges would have been equally confused; in others, at least part of the problem can be ascribed to how the evidence was given to juries or how certain relevant information was denied to them. On the other hand, jurors appear to be skeptical of experts, attempt to make sense of their testimony, and rely on the most able jurors. None of the studies produced any evidence that in the face of complicated testimony jurors simply deferred to the experts and suspended their responsibility to make the best judgment that they could.

VII. EXPERIMENTAL RESEARCH ON JURY UNDERSTANDING OF COMPLEX EVIDENCE HAS PRODUCED NO CONSISTENT PATTERN OF FINDINGS THAT JURIES PERFORM POORLY.

A substantial body of research has involved simulation experiments intended to tease out some of the factors that bear on juror understanding of expert evidence or other complex testimony. More extensive reviews of these studies are contained in various journals, law reviews and books.[28]

Horowitz and Bordens[29] conducted a realistic trial experiment involving a toxic tort claim. Those authors concluded that the juries used the totality of evidence to decide the issues, particularly causation, in a rational and responsible way. In a subsequent experiment, Horowitz et al.[30] varied the information load and complexity of the trial evidence. A high information load

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[28] *See* note 2, *supra*, for references that summarize these studies.

[29] Irwin Horowitz & Kenneth Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269 (1990).

[30] Irwin Horowitz et al., *Effects of Trial Complexity on Decision Making*, 81 J. APPLIED PSYCHOL. 1 (1996).

attenuated juror performance with respect to the evaluation of liability. However, the result was that the jurors ascribed greater blameworthiness to the plaintiff rather than to the defendant.

Diamond and Casper[31] conducted an experiment involving an antitrust trial. Juries watched either an expert present a complex statistical regression model about damages or an expert compute damages based on a more concrete "yardstick" analysis. The statistical expert was generally seen as having greater expertise but lower clarity than the expert who used the yardstick analysis and, as a consequence, the testimony of the two experts did not differ in perceived persuasiveness or in ultimate influence on verdicts.

An experiment by Cooper et al.[32] involving a products liability trial was referred to in Petitioners' briefs. Cooper et al. summarized their results by asserting that "jurors were more persuaded by a highly expert witness than a less expert witness, but only when the testimony was highly complex."[33] Closer examination of the experiment indicates that it does not support that conclusion. The respondents in each condition were given the same evidence by the expert. The actual manipulation of "complexity" was the degree of jargon with which the testimony was presented. The experiment only allows the conclusion that a highly credentialed expert was more influential when he used technical jargon. Other data in the article indicate that the jurors *did* critically evaluate the content of the message, regardless of whether it was delivered with the trappings of technical jargon.

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[31] Shari Diamond & Jonathan Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 L. & SOC'Y REV. 401 (1992).

[32] Joel Cooper et al., *Complex Scientific Testimony: How Do Jurors Make Decisions?*, 20 LAW & HUM. BEHAV. 379 (1996).

[33] *Id.* at 379.

A number of other experiments have examined the effects of experts in the context of criminal trials, including instances where there was a battle of experts. These studies also lend little support to the assertions that juries uncritically accept expert evidence.[34]

Consistent with real jurors' statements that they have difficulty with complex statistical evidence,[35] a number of experimental studies have found that jurors have difficulty in reasoning about statistical evidence and the inferences that can be drawn from it.[36]

It is important that these problems of statistical reasoning not be minimized, but several cautions are in order. First, the experimental studies have presented the evidence as abstract problems. Juror understanding may be better when the statistics are contained in the factual context of a real case. Also, many of the experimental studies have focused on individual jurors whereas the jury's decision is a result of group deliberation, and, as indicated above, jurors report that they rely on those jurors who have a better grasp of the evidence. The third issue concerns these abstract problems and the comparative standards by which the statistical

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[34] *See* Margaret Kovera et al., *Expert Testimony in Child Sexual Abuse Cases*, 18 LAW & HUM. BEHAV. 653 (1994); Neil Vidmar, *Assessing the Impact of Statistical Evidence, A Social Science Perspective, in* THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS 279, 296-97 (Stephen Fienberg ed., 1989); Neil Vidmar & Regina Schuller, *Juries and Expert Evidence: Social-Framework Testimony*, 52 LAW & CONTEMP. PROBS. 133 (1989).

[35] *See* Cecil et al., *supra;* Jane Goodman et al., *What Confuses Jurors in Complex Cases*, 21 TRIAL 65 (Nov. 1985); Ivukovich & Hans, *supra*.

[36] *See* David Faigman & A. J. Baglioni, *Bayes' Theorem in the Trial Process: Instructing Jurors on the Value of Statistical Evidence*, 12 LAW & HUM. BEHAV. 1 (1988); Brian Smith et al., *Jurors' Use of Probabilistic Evidence*, 20 LAW & HUM. BEHAV. 49 (1996); William Thompson, *Are Juries Competent to Evaluate Statistical Evidence?*, 52 LAW & CONTEMP. PROBS. 9 (1989).

reasoning is assessed. Wells[37] conducted an experiment comparing the reasoning processes of 111 experienced trial judges and 740 students in a series of vignettes involving a statistical problem or more concrete evidence. Wells concluded that " concrete evidence is given more weight by both judges and jurors." It is not surprising that this is so, as research indicates that even scientists and other highly trained individuals undervalue and become confused by statistical information.[38]

A study by Schuman[39] found that when scientific evidence gets exceptionally complex, credibility cues in the form of expert credentials have an especially strong influence on how the jury resolves a clash of experts. An experiment by DeWitt et al.[40] involving expert testimony about "brainwashing" by religious cults concluded that the mock jurors did not perform optimally, giving too much weight to the testimony of a less reliable witness.

Research by Diamond et al.[41] studied the influence of an expert testifying that a death penalty defendant was certain to kill again, a prediction not justified by any body of scientific evidence. Confrontation with a strong cross-examination or an opposing expert or both did not reduce the influence of the expert on votes for death. These results suggest that an expert can be particularly influential

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[37] Gary Wells, *Naked Statistical Evidence of Liability: Is Subjective Probability Enough?*, 62 J. PERS. SOC. PSYCHOL. 739 (1992).

[38] Michael Saks & Robert Kidd, *Human Information Processing and Adjudication: Trial By Heuristics*, 15 LAW & SOC'Y REV. 123 (1980).

[39] Shuman et al., *supra*.

[40] John S. DeWitt et al., *Novel Scientific Evidence and Controversial Cases: A Social Psychological Examination*, 21 LAW & PSYCHOL. REV. 1 (1997).

[41] Diamond, et al., *Juror Reactions to Attorneys at Trial*, 87 J. CRIM. L. & CRIMINOLOGY 17 (1996).

when testifying in favor of a position that finds strong support in juror values.

In recent experiments involving reactions to DNA evidence Koehler[42] and Schklar and Diamond[43] found that laypersons had difficulty appropriately combining information about the probability of a random match and the probability of a lab error. Errors were not reduced by simple instructions about how to combine these pieces of information properly. Expectancies about lab error rates and intentional tampering affected the way that laypersons interpreted the test results.

The various experimental studies, therefore, conflict in their findings with respect to how jurors deal with scientific and other technical evidence. The specific conditions under which such evidence may or may not be appropriately used by juries is not well understood. However, none of the studies indicate that jurors approach the evidence with casualness or just defer to expert testimony.

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[42] Jonathan Koehler, *Error and Exaggeration in the Presentation of DNA Evidence at Trial*, 34 JURIMETRICS J. 21 (1993).

[43] Jason Schklar & Shari Diamond, *Juror Reactions to DNA Evidence: Errors and Expectancies*, AMER. BAR FOUND. WORK. PAP. No. 9713-R, 23 LAW & HUM. BEHAV. (In press 1999).

VIII. THERE IS SCANT EVIDENCE TO SUPPORT THE VIEW OF JURIES BEING PRO-PLAINTIFF AND ANTI-BUSINESS. IN FACT RESEARCH FINDINGS INDICATE THAT JURORS ARE SKEPTICAL OF PLAINTIFF CLAIMS.

Many jury critics have leveled the complaint that juries are pro-plaintiff, anti-business, or anti-defendant.[44] This is also implicit in the Petitioners' and some of the Petitioners' *amici* briefs, which argue that accompanying the alleged tendency of juries to defer to experts is a tendency to favor plaintiffs over defendants. In fact, empirical evidence provides little support for this claim and considerable reason to reject it.

The surveys of judges, reported above, indicate that judges do not generally believe that juries have a pro-plaintiff bias. An additional finding comes from a study by Ostrom et al.[45] that found that corporations did better, not worse, than individual defendants. Ostrom et al. found no differences in the overall win rate as a function of corporate identity, though there were some specific types of trials in which plaintiffs suing businesses prevailed at a higher rate. These results could be a function of the better resources corporations have when they litigate cases, the types of cases that they allow to proceed to litigation or some other cause, but they do not appear to support the view that corporations are handicapped relative to individual defendants.

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[44] DANIELS & MARTIN, *supra*; Valerie Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 JUDICATURE 242 (1996) (reviewing her program of research); Robert MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep Pockets" Hypothesis*, 30 L. SOC'Y. REV. 121 (1996).

[45] Brian Ostrom et al., *What are Tort Awards Really Like? The Untold Story from the State Courts*, 14 LAW & POL'Y 85 (1992).

In contrast to these findings, Chin and Peterson[46] found that when individuals sued corporations they won at a higher rate than when individuals sued other individuals. A national study of state court jury verdicts found that although the overall win rate against individual and corporate defendants was the same, in specific types of cases corporate defendants were more likely to lose than individual defendants.[47] However, Vidmar[48] pointed out that these findings do not necessarily indicate anti-corporation bias because there are other plausible explanations for the outcomes.

In a recent, examination of factors that affect punitive damage awards Eisenberg et al.[49] found that punitive awards were, on average, much more modest than is often claimed. Additionally, when other factors were taken into account, there was also no evidence that punitive awards were more likely when individuals sue businesses than when individuals sue individuals. In an earlier study Clermont and Eisenberg[50] compared verdict outcomes in a large nationwide sample of civil cases from the federal courts with judges' verdicts in bench trials. The plaintiff win rate was higher in bench trials than in jury trials. This latter finding must be interpreted in light of the fact that it is likely that there were differences in the

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[46] AUDREY CHIN & MARK PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS (1985).

[47] Brian Ostrom et al., *A Step Above Anecdote: A Profile of The Civil Jury in the 1990s*, *supra*.

[48] Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U. L. REV. 1205 (1994).

[49] Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997). *See also* DANIELS & MARTIN, *supra*, at 152-198.

[50] Kevin Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1991).

cases that went to jury versus bench trials,[51] but it lends no support to the view that juries are more partial to plaintiffs than judges would be.

The study of civil juries in Arizona that compared the views of the trial judges with the jury's verdict showed no evidence that juries deciding business cases were disproportionately at odds with the judges' views. Judges' satisfaction ratings of the juries' verdicts were the same for cases with individual and corporate defendants.[52]

Hans[53] has conducted extensive research involving corporate and other business defendants. Interviews with jurors found that more than eighty percent believed that there are too many frivolous lawsuits, and only about a third of them were willing to endorse the view that plaintiffs have legitimate grievances. The jurors indicated that their deliberations often centered around the behavior of the plaintiff and speculation about his or her possible motives in bringing the suit rather than on the behavior of the defendant. Hans and Lofquist[54] concluded:

> Jurors often penalized plaintiffs who did not meet high standards of credibility and behavior, including those who did not act or appear as injured as they claimed, those who did not appear deserving due to their already high standard of living, those with preexisting medical conditions, and those who did

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[51] Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, *supra*.

[52] HANS et al., *supra*.

[53] Valerie Hans, *Illusions and Realities in Jurors' Treatment of Corporate Defendants*, 48 DEPAUL U. L. REV. (forthcoming 1998).

[54] Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Liability Explosion Debate*, 26 LAW & SOC'Y REV. 85 (1992).

not do enough to help themselves recover from their injuries.

Further documentation of lay suspicion of plaintiffs is provided by public opinion polls, which routinely find that the majority of the public believes that many plaintiffs bring frivolous and illegitimate lawsuits.[55]

In interviews with jurors who decided medical malpractice cases Vidmar[56] found similar attitudes regarding suspicions about plaintiffs and their motives as well as pro-doctor sympathies.

A series of experimental studies also found no support for the view that juries are hostile to defendants that are corporations, doctors or entities that otherwise have deep pockets.[57] Jurors appear to respond to corporate litigants somewhat differently, but differential treatment appears to be grounded in distinctive aspects of corporate harm-doing rather than in anti-business bias. MacCoun's research,[58] as well as that of Hans, raises the likelihood that jurors may judge corporate responsibility by a "reasonable corporation" standard. They assess the resources and abilities of corporations to anticipate and prevent harms as being greater than that of individuals, and they are suspicious of the pecuniary motives that drive business behavior. Hans concludes from her research:

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[55] Valerie P. Hans & William Lofquist, *Perceptions of Civil Justice : The Litigation Crisis Attitudes of Civil Jurors.*, 12 BEHAVIORAL SCIENCES AND THE LAW 181 (1994).

[56] VIDMAR, supra.

[57] Valerie Hans, *The Contested Role of the Civil Jury in Business Litigation, supra*; MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep Pockets" Hypothesis, supra.*

[58] MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep Pockets" Hypothesis, supra.*

> Reflecting the citizenry from which they are drawn, civil jurors are largely supportive of the aims of American business and extremely concerned about the potential negative effects on business corporations of excessive litigation. At the same time, they hold corporate defendants to more exacting standards compared to individual litigants, and expect businesses to exhibit a high degree of care for workers and consumers.[59]

In short, the preponderance of research findings strongly contradict the assertion that jurors automatically have special sympathy for plaintiffs and hostility toward business defendants.

IX. EXPERT EVIDENCE IS OFTEN NOT THE ONLY EVIDENCE AROUND WHICH COMPLEX CASES TURN.

In considering the impact of expert evidence on the jury the various surveys, case studies and experiments, discussed above, have uncovered the fact that jurors evaluate the expert testimony in the context of other evidence. This is an important reminder that in many instances the crucial evidence regarding negligence revolves around evidence about human actors. To modify a phrase from the Watergate era, the jury is asked to decide: "What did they know and when did they know it?" Consider the products liability case of *West v. Johnson & Johnson Products, Inc.*,[60] a claim involving toxic shock syndrome resulting from the use of tampons. It resulted in a verdict for the plaintiff and the trial and appellate courts agreed with the jury. Experts testified about toxic shock syndrome in that trial, but the case turned on such issues as whether the manufacturer should have discovered evidence about toxic shock syndrome before the

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[59] Hans, *Illusions and Realities in Jurors' Treatment of Corporate Defendants, supra.*

[60] 220 Cal. Rptr. 437 (Ct. App. 1985).

Centers for Disease Control and Prevention did and whether the consumer complaints to J&J Products should have put the company on notice that there was a potentially serious problem. Similar types of issues were involved in the now infamous McDonald's coffee spill case.[61] Trial evidence not only produced expert evidence about the severity of burns suffered by the plaintiff but also evidence that McDonald's coffee was kept at a temperature much higher than that of other restaurants and that there had been hundreds of complaints about coffee burns but McDonald's had never consulted a burn specialist. In other product liability cases the claim may be that a manufacturer represented that a product was safe when in fact there was either no evidence for such a claim, or worse, that it had evidence to the contrary. Vidmar[62] documented the fact that in medical malpractice cases many disputes turned on whether miscommunications took place between health care providers or on supervisory failures.

The lesson from these product liability and malpractice case examples is that while issues of causation and injury requiring expert testimony may play a role in the trial, the dispositive issues may involve credibility of witnesses as to what occurred or factual evidence bearing on the degree to which the plaintiff adhered to standards of legal regulations, market practice or medical care. Judging matters of credibility and human performance are matters that have traditionally been left to the jury. Thus, the centrality of expert testimony for the verdict varies from trial to trial, and its potential impact should be evaluated in the total context of that trial.

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[61] *See Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309, at *1 (N.M. Dist. Aug. 18, 1994); Samuel Gross & Kent Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 4-5 (1996) (providing case details and additional commentary on this case).

[62] Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice, supra.*

CONCLUSION

The Supreme Court's decision in this case should not be based on the Petitioners' unsupported or flawed assertions that juries fail to critically evaluate expert testimony, that they are overawed by experts, that they have a "natural tendency" to defer to experts, and that they have pro-plaintiff and anti-business biases. The heavy preponderance of data from more than a quarter century of empirical jury research points to just the opposite view of jury behavior.

APPENDIX A

BACKGROUND AND QUALIFICATIONS OF

AMICI CURIAE

Neil Vidmar, Ph.D., is Russell M. Robinson II Professor of Law and Professor of Psychology at Duke University. He is author of *Medical Malpractice and the American Jury* (1995); co-author of *Judging the Jury* (1986); editor of a forthcoming book on contemporary common law jury systems; and author of approximately 30 scholarly articles on civil and criminal juries.

Richard Lempert, J.D./Ph.D., is Francis A. Allen Professor of Law and Professor of Sociology, University of Michigan School of Law and Department of Sociology and a former editor of *Law & Society Review*. He is co-author of *A Modern Approach to Evidence* and *An Invitation to Law and Social Science*, plus leading articles on jury performance in complex cases.

Shari S. Diamond, Ph.D., J.D., is a Senior Fellow at the American Bar Foundation, Professor of Psychology at the University of Illinois and a former editor of *Law & Society Review*. Currently a visiting professor at Northwestern University Law School, Diamond has authored many articles on the jury and is currently finishing a book examining jury behavior, including responses to expert testimony.

Valerie P. Hans, Ph.D., is Professor of Sociology and Criminal Justice and Professor of Psychology at the University of Delaware, where she directs the Legal Studies Program. Co-author of *Judging the Jury* (1986), she has written numerous articles bearing on the civil and criminal jury systems.

Stephan Landsman, J.D., is Robert A. Clifford Professor of Tort Law and Social Policy at DePaul University College of Law.

He is the author of *Adversarial Justice: The American Approach to Adjudication* (1988), as well as more than a dozen scholarly articles on the history and behavior of juries.

Robert MacCoun, Ph.D., is Professor of Public Policy and Affiliated Professor of Psychology, University of California at Berkeley. He is author of seventeen scholarly articles and book chapters on jury decision making, as well as numerous other articles on tort litigation and alternative dispute resolution.

Joseph Sanders, J.D., Ph.D., is A.A. White Professor of Law at the University of Houston. He is author of *Bendectin on Trial* (1998) and co-editor of *Modern Scientific Evidence (1997).*

Harmon M. Hosch, Ph.D., is Professor of Psychology and Associate Dean of Liberal Arts at the University of Texas at El Paso. He has served as Director of the National Science Foundation's Law and Social Science Program. He has authored scholarly articles that focus on the impact of expert testimony on juries.

Saul Kassin, Ph.D., is Professor of Psychology, Williams College and co-author of *The American Jury on Trial* (1988) and numerous research articles on juries.

Marc Galanter, J.D., is the John and Rylla Bosshard Professor of Law and Director of the Disputes Processing Research Program at the University of Wisconsin Law School. He is the author of over thirty articles on the civil justice system, including three studies of juries.

Theodore Eisenberg, J.D., is the Henry Allen Mark Professor of Law, Cornell Law School. He serves on the editorial board of the Law and Society Review, the Justice System Journal, and the new American Law and Economics Association Journal, and is a Fellow of the Royal Statistical Society. He is the author of dozens of scholarly empirical articles, including articles on products liability and articles comparing judge and jury behaviors.

Stephen Daniels, Ph.D., is a Senior Fellow at the American Bar Foundation and Adjunct Professor of Political Science at Northwestern University. He is co-author of *Civil Juries and the Politics of Reform* (1995) and author of more than a dozen scholarly publications on juries and the civil justice system.

Edith Greene, Ph.D., is Associate Professor of Psychology at the University of Colorado. She is author of approximately 25 scholarly articles on the jury and is co-authoring a book entitled, *The Psychology of Jury Damage Awards*.

Joanne Martin, J.D. M.B.A., is a senior research fellow, American Bar Foundation. She is co-author of *Civil Juries and the Politics of Reform* (1995) and author or co-author of numerous articles on juries, the civil justice system and the legal profession.

Steven Penrod, J.D. ,Ph.D., is Professor of Psychology and Professor of Law at the University of Nebraska—Lincoln and Director of its Law and Psychology Program. He is a co-author of *Inside the Jury* (1983) and several dozen empirical research articles on civil and criminal juries.

James Richardson, J.D., Ph.D., is Professor of Sociology and Judicial Studies and Director of the Master of Judicial Studies Program at the University of Nevada, Reno. He has researched and written on jury performance, including reactions to experts.

Larry Heuer, Ph.D., is Associate Professor of Psychology at Barnard College, Columbia University. He has authored numerous articles on jury trial procedures and social justice.

Irwin Horowitz, Ph.D., is Professor of Psychology at Oregon State University and Adjunct Professor of Law at the University of Oregon. He is co-author of *The Psychology of Law* (1984) and approximately 40 scholarly articles on juries.